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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM R. BAUMAN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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14 pp

QUESTION PRESENTED

Whether the Petitioner's guilty pleas should be set aside as improvident due to the petitioner's misunderstanding of the government's ability to terminate his pay, this notwithstanding the government's affirmative promise to suspend any forfeiture of pay for nine years after which the forfeitures would be remitted without further action.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, William R. Baumann, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Armed Forces entered in this case on 30 May 1995.

OPINIONS BELOW

The final order of the United States Court of Appeals for the Armed Forces is reported at —— MJ —— (1995) (Appendix A). The unpublished opinion of the United States Air Force Court of Military Review, issued on June 30, 1994 is attached (Appendix B).

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 30 May 1995. The jurisdiction of this Court is invoked under 28 USCA

§ 1259(3) (Supp. 1992) and 10 USCA § 867(a) (Supp. 1992).

STATEMENT OF THE CASE

Prior to trial, the petitioner offered to plead guilty to the charges and specifications pending against him in return for the following sentence limitation from the convening authority:

> 1. No confinement exceeding 10 years will be approved;
>
> 2. Any forfeitures of pay shall be suspended for the duration of any adjudged confinement, said suspension contingent upon the accused creating and maintaining an allotment to Lima Bauman for the use and benefit of her, Geary Bauman, and Jill Webb, as outlined in the Offer for Pretrial Agreement.
>
> 3. No fine will be approved.

App. Ex. IV. As part and parcel of this agreement, the petitioner agreed that he would:

> . . . execute an individual account in the name of Lima Bauman, said allotment to be for the use and benefit of Lima Bauman, Geary, and Jill Webb, and to continue through the length of my confinement. This allotment will be established not sooner than five working days prior to the actual day of trial, and not later than the actual day of trial. I agree that if at any time after the execution of this agreement, should I terminate, reduce or change the allotment in any way, the Convening Authority may vacate the suspension of any adjudged forfeitures.

App. Ex. 1. The petitioner's offer to plead guilty was accepted by the convening authority and, at trial, the petitioner pled guilty to all charges and specifications against him.

REASONS FOR GRANTING THE WRIT

THE PETITIONER'S GUILTY PLEAS SHOULD BE SET ASIDE AS IMPROVIDENT DUE TO THE PETITIONER'S MISUNDERSTANDING OF THE GOVERNMENT'S AFFIRMATIVE PROMISE TO SUSPEND ANY FORFEITURE OF PAY FOR NINE YEARS AFTER WHICH THE FORFEITURES WOULD BE REMITTED WITHOUT FURTHER ACTION

As the above concise history of the pre-trial agreement in this case indicates, the "bargain" struck between petitioner and the convening authority was that petitioner would waive his Article 32 U.C.M.J. hearing, plead guilty, and start an allotment to his wife, in return for which the convening authority represented to him that his military pay would not be stopped for the duration of any adjudged period of confinement. The unambiguous language of the agreement indicates that it was the intent of the parties that the continuation of the petitioner's pay would extend beyond the relatively short term it would take for petitioner's court-martial to be processed and reviewed during the normal appellate process. The convening authority specifically agreed to suspend any forfeiture of pay for nine years, after which time it would be remitted without further action. As noted by the petitioner in his post-trial affidavit, previously submitted under separate motion (hereinafter Affidavit), the petitioner was therefore quite surprised by the news that the government could, in effect, unilaterally change the terms of his "bargained for" pretrial agreement: "It wasn't until I arrived at the USDB I was told that when anyone completes the entire appeal process and is then dismissed, THAT PAY STOPS AUTOMATICALLY REGARDLESS OF ANY AGREEMENT. I would not have agreed to that, or any other arrangement with such an understanding." Affidavit. This affidavit clearly shows a misapprehension on the part of the petitioner, rendering his guilty pleas void.

A closely analogous situation in which guilty pleas pursuant to a pretrial agreement have been set aside due to a misunderstanding on the part of an accused involve the erroneous calculation of maximum potential sentences. In one such pretrial agreement case reversed by the Court of Military Appeals (now the Court of Appeals for the Armed Forces), the accused misapprehended the maximum confinement he could have faced. In *United States v. Walker* 34 M.J. 264 (C.M.A. 1992), the Court of Military Appeals highlighted the fact that the accused's misunderstanding as to the maximum potential punishment (which was reduced from 10 years and 6 months to 5 years and six months by the Court of Review *after* his court-martial), rendered his guilty pleas pursuant to a pretrial agreement improvident. The Court noted that "a plea of guilty may be improvident if it is predicated upon a substantial misunderstanding on the accused's part of the maximum punishment to which he is subject," citing *United States v. Windham,* 36 C.M.R. 21, 23 (1965) and *United States v. Harden,* 1 M.J. 258, 260 (C.M.A. 1976), respectively. The Court held that applying an "elastic standard" which considered "all the circumstances of the case" to determine if the misunderstanding of the maximum sentence was an insubstantial factor in the accused's case led to one conclusion: it could not "say that the difference in maximum punishment was an 'insubstantial factor' in petitioner's decision to plead guilty." *Walker,* 34 M.J. at 267. The Court then held the petitioner's plea improvident.

Just as the accused's pleas were rendered improvident in *Walker* by his misunderstanding regarding the maximum punishment in his case, so are the petitioner's guilty pleas improvident in the case *sub judice.* The discrepancy as to what the petitioner thought regarding the status of his forfeitures cannot be lightly dismissed as an "insubstantial" factor in the petitioner's decision to plead guilty. As the petitioner notes in his affidavit, his willingness to enter into a pre-trial agreement with the government was

substantially influenced by this misunderstanding. In his affidavit the petitioner unequivocally states he would not have entered the pre-trial agreement if he had known that in fact his family would not be provided for. Affidavit. Accordingly, as was the case in *Walker,* this Honorable Court cannot say that petitioner's misunderstanding was an "insubstantial factor in petitioner's decision to plead guilty." The pleas should thus be set aside as improvident.

In its opinion, the Air Force Court of Military Review (now the Air Force Court of Criminal Appeals), summarily affirmed the findings and the sentence as adjudged without commenting on the substance of this assignment of error. The Court of Appeals similarly gave this assignment of error short shrift in its final order, simply affirming the lower court's opinion based upon its previous holding in *United States v. Albert,* 30 M.J. 331 (C.M.A. 1990). Petitioner would submit that *Albert* is distinguishable from the case at bar on its facts.

In *Albert,* the appellant, a noncommissioned officer, had reached the end of his term of enlistment prior to being brought to trial; thus his entitlement to pay and allowances had actually ceased prior to trial. In his case, the convening authority simply did not have the power to reinstate his pay during his period of confinement even if he had wanted to. In the case at bar, however, both the convening authority and petitioner were well aware that, because of petitioner's status as an officer, his pay would continue indefinitely until the completion of appellate review and the execution of his dismissal, by that same convening authority. Obviously, the parties in *Albert* and the case *sub judice* were in substantially different positions with regard to the entitlement to pay and allowances subsequent to trial. Whereas the convening authority in the case *sub judice* could have delivered on his promise by not executing the dismissal, the hands of the convening authority in *Albert* were, for all practical purposes, tied.

In addition to being factually distinguishable from the case at bar, *Albert* is just plain wrong and should not be followed by this Honorable Court. In this case, the prosecutors and the convening authority made a "bargain" with appellant. As noted in *Santabello v. New York*, 404 U.S. 257 (1971), when a prosecutor makes a bargain, "the defendant is entitled either to specific performance or to an opportunity to withdraw his guilty pleas". In the posture this case is currently in, the convening authority will not have to honor his express agreement with petitioner. Petitioner would submit that such a circumstance violates fundamental precepts of military due process and should not be countenanced by this Honorable Court.

CONCLUSION

The question presented is genuinely important and affects not only petitioner, but the rights of countless other individuals who plead guilty to criminal offenses in return for specific guarantees from prosecutorial authorities, both in the military and in the civilian communities. The petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari and remand to the United States Court of Appeals for further consideration in light of its opinion in *Santabello v. New York, id.*

Respectfully submitted,

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Chief, Appellate Defense Division
Counsel of Record

ERIC N. EKLUND
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Counsel for the Petitioner

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August 1995

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 94-1369/AF
CMR Dkt. No. 30190

UNITED STATES,
Appellee

v.

WILLIAM R. BAUMAN (326-42-0442),
Appellant

ORDER

On further consideration of the granted issue (Daily Journal, January 24, 1995) in light of *United States v. Albert*, 30 MJ 331 (CMA 1990), it is by the Court this 30th day of May, 1995,

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES

v.

CAPTAIN WILLIAM R. BAUMAN, 326-42-0442
United States Air Force

ACM 30190

30 June 1994

Sentence adjudged 4 August 1992 by GCM convened at United States Air Force Academy, Colorado. Military Judge: Robert F. Penater (sitting alone).

Approved sentence: Dismissal, confinement for 9 years, forfeiture of all pay and allowances (suspended for 9 years, at which time, unless the suspension is sooner vacated, will be remitted without further action).

Appellate Counsel for Appellant: Colonel Terry J. Woodhouse, Major Mary C. Yastishock, and Major David D. Jividen.

Appellate Counsel for the United States: Colonel Richard L. Purdon, Colonel Jeffery T. Infelise, and Major Jules D. Silberberg.

Before

DIXON, GRUNICK, and PEARSON
Appellate Military Judges

PER CURIAM:

Like the military judge at trial, we find appellant knowingly and voluntarily entered pleas of guilty pursuant to a valid pretrial agreement which he understood despite his post-trial protestations to the contrary. *See* R.C.M. 910. We also conclude the military judge did not err in admitting expert sentencing testimony about future counseling the victim may need. *See United States v. Hammond*, 17 M.J. 218 (C.M.A. 1984). Finally, we find appellant's sentence appropriate in light of the egregious sexual abuse he inflicted on his young stepdaughter over a span of several years including both attempted rape and fellatio to ejaculation. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988).

We have examined the record of trial, the assignment of errors, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly the findings and sentence are

AFFIRMED.

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